U.S. Department of Labor

Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)

Issue Date: 09 May 2005

CASE NO.: 2003-LHC-02621
OWCP NO.: 1-157114

In the Matter of

JAMES LEE
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer

Appearances:

Lance G. Proctor, Esq., Lance G. Proctor, LLC, Westerly, Rhode Island, for the Claimant

Conrad M. Cutcliffe, Cutcliffe, Glavin & Archetto, Providence, Rhode Island, for the Employer

Before: Colleen A. Geraghty
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

The present matter is a claim for worker's compensation and medical benefits for a hand injury filed by James Lee (the "Claimant") against the Electric Boat Corporation (the "Employer" or "Electric Boat") under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. A hearing was conducted before me on January 21, 2004 in Providence, Rhode Island, at which time the parties were afforded the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. Documentary evidence was admitted without objection as the Claimant's Exhibits ("CX") 1-4 and the Employer's Exhibits ("EX") 1-14. Formal papers were admitted as Administrative Law Judge Exhibits ("ALJX") 1-10, and testimony was heard by the Claimant. Hearing Transcript ("TR") 9-14.

II. Issues Presented

At hearing, the parties orally stipulated that the Act applies to the present claim, that there was an employer/employee relationship, that the Claimant suffered an injury to the hands, that the injury was timely noticed and timely filed, and that the Claimant's average weekly wage was $580.45. The remaining issues to be adjudicated are (1) whether a May 1, 1995 settlement decree issued by the Rhode Island Workers' Compensation Court bars the Claimant's present claim under the Longshore Act based on the principles of collateral estoppel and full faith and credit; (2) causation; and (3) the nature and extent of the Claimant's injury.

After careful analysis of the evidence contained in the record, the parties' stipulations and their briefs, I conclude that the present claim is not barred by the May 1, 1995 decree, that the Claimant's hand condition was caused by his employment at Electric Boat, and that his hand condition has resulted in a 6 percent permanent partial disability.

My findings of fact and conclusions of law are set forth below.

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant, James Lee, was employed as a shipfitter at Electric Boat for approximately fifteen years, from 1980 to August 18, 1994. TR 20, CX 1. The Claimant testified that as a shipfitter he performed various types of work such as welding, grinding, rigging and drilling. TR 20-21. In the course of his employment, the Claimant used some pneumatic tools, including drills, whirlybirds for grinding, and burr machines for cleaning joints in metal and taking off slag. TR at 21, 24, 27. The Claimant testified that while using the whirlybird, he wore regular work gloves and felt jerking and constant vibration in his arms. TR at 23. The Claimant felt vibrations in his arms while using the burr machines. TR at 25. He testified that that he used the pneumatic tools approximately 4 hours per day, and that he would feel numbness and tingling in his hands at the end of the day, but did not lose any work time due to his hands. TR at 27-28, 37. In addition, he stated that he did not recollect going to the Employer's dispensary to seek treatment. *Id.* at 37. He further testified that after leaving Electric Boat, his hands felt numb, stiff and tingling from time to time, but that he attributed the feelings to age. TR at 28.

The Claimant left Electric Boat following layoffs in 1994, after which point he worked as a truck driver for a seafood company and then for Home Depot. TR at 28-29. The Claimant stated that his positions as a truck driver involved no loading or use of hand tools. TR at 29. The Claimant also worked for a medical supply company delivering oxygen and other medical equipment to people's homes, and stated that his work did not involve the use of pneumatic tools or hand tools. TR at 30. The Claimant currently works for the Rhode Island Department of Transportation as a motorized equipment operator. *Id.* In this capacity, the Claimant performs duties such as driving trucks, plowing snow, patching asphalt and running chainsaws and weed wackers. *Id.* The Claimant stated that he uses the chainsaws and weed wackers from approximately April to August for a maximum of three to four hours per week. *Id.* The

Claimant further stated that after using these tools, he feels the same type of numbness and tingling as he did when operating pneumatic tools at Electric Boat. TR at 30-31, 41.

The Claimant testified that he rides a motorcycle "once in a while" during the summer months, on days when he does not work. TR at 33-34. He stated that in the most recent summer months he rode his motorcycle approximately eight times and that he typically rides a distance of approximately 50 miles. TR at 33, 39. The Claimant further stated that while riding he wears padded gloves, and that his hands feel numb and tingling afterwards. TR at 33.

The Claimant was referred to Dr. John Meyer for his hand condition by Attorney Peter Schavone, whom he had initially contacted to seek compensation for orthotics due to a previous foot injury. TR. at 31, 38. The Claimant testified that following various tests on his hands, Dr. Meyer told him he had carpal tunnel problems and some nerve damage. TR at 32. He further testified that Dr. Meyer told him the hand condition might be related to his employment at Electric Boat. *Id.* Dr. Meyer gave the Claimant splints to wear while sleeping, which he continues to use. *Id.* Dr. Meyer did not recommend surgery. *Id.*

In 1995, the Claimant settled a claim in the Rhode Island Worker's Compensation Court for a foot injury that occurred while working at Electric Boat. TR at 34. The Claimant testified that he believed the settlement pertained only to his foot injury. TR at 36. He also testified that he recalls signing the settlement papers, appearing before a judge in the Rhode Island Workers' Compensation Court and responding to the judge's questions. TR at 41.

The Claimant now seeks compensation and medical benefits under the Act for a 7 percent permanent partial disability of each hand. TR at 18.

B. Collateral Estoppel

Before proceeding to the merits of the present matter, the Court must address whether collateral estoppel bars the Claimant from bringing his October 14, 2002 hand injury claim under the Act because he signed a general release in a 1995 settlement approved by the Rhode Island Workers' Compensation Court. *See* EX 3, 4. The Employer argues that the Claimant discharged the Employer from all liability, including liability for future injuries and injuries "known and unknown," when he signed the general release as part of a settlement agreement in the State of Rhode Island's Workers' Compensation Court. Emp. Br. at 3-8. The Employer contends that the October 2002 claim is barred by the principles of collateral estoppel and full faith and credit due to the State of Rhode Island settlement and the final court decree issued May 1, 1995. Emp. Br. at 6-7. In support of its argument, the Employer cites the Claimant's April 12, 1995 testimony before Chief Judge Arrigan, in which the Claimant states that he understands he will no longer have any other future legal recourse against the Employer if the Rhode Island court approves the settlement.[1] Emp. Br. at 5. In addition, the Employer cites the Final Decree issued

[1] The Claimant's testimony is recorded as follows:
Q [Judge Arrigan]: Do you understand that if the Court approves your Petition for Commutation, that you will no longer have any other future legal recourse against your employer or the National Employer's Insurance Company?
A [Claimant]: Yes.
Emp. Br. at 5; EX 13 at 6.

by the court, which indicates that a settlement payment was made in the sum of $35,000.00, a release was signed, and that the Employer was "discharged from all liability under the Workers' Compensation Act."[2] Emp. Br. at 6; EX 3. The Employer suggests that in signing the release the Claimant intended to settle all injuries in 1995, including his hand condition, as evidenced by his testimony indicating that he felt numbness to his hands when he last worked for the Employer in 1994. Emp. Br. at 6.

The Claimant responds that collateral estoppel does not bar the Claimant's Longshore claim because a settlement for the Claimant's left foot injury was never approved pursuant to Section 8(i) of the Act and because the Claimant's state settlement in the Rhode Island Workers' Compensation Court does not conform to the requirements of Section 8(i) of the Act. Cl. Br. at 4.

"No agreement by an employee to waive his right to compensation under the Act shall be valid." 33 U.S.C. § 915(b). Where a claimant seeks to terminate his compensation claim for a sum of money, Section 8(i) settlement procedures must be followed. *Norton v. Nat'l Steel & Shipbldg. Co.*, 25 BRBS 79, 83 (1991). Under the Act, a claimant may only settle those claims in existence at the time of the agreement, and the agreement may not preclude future claims if the claims were not vested at the time of settlement. 33 U.S.C. § 908(i); 20 C.F.R. § 702.241(g); *Corner v. Chevron Internat'l Oil Co., Inc.*, 22 BRBS 218, 220 (1980).

On May 1, 1995, the Rhode Island Workers' Compensation Court issued a Final Decree stating that the Employer "is hereby discharged from all liability under the Workers' Compensation Act by reason of every and all injuries, known or unknown which were or may have been sustained on 8/17/94 or on any other date during the course of the Petitioner's employment. . . ." EX 3. The language of the Final Decree limits the release of the Employer's liability to claims made under the Rhode Island Workers' Compensation Act, and does not include a release from liability under the Longshore Act. Even if it did, such a release is invalid unless the parties follow the requirements of Section 8(i) of the Act. 33 U.S.C. § 915(b); *Norton v. Nat'l Steel & Shipbldg. Co.*, 25 BRBS at 83; *see also Ryan v. Alaska Contractors*, 24 BRBS 65 (1990) (Jones Act settlement in which claimant signed release was not 8(i) settlement and thus did not terminate claimant's rights under the Act). In the present case, the state settlement did not follow Section 8(i) requirements. Moreover, while the Rhode Island settlement involved a claim for a left foot injury, the present Longshore claim involves the Claimant's alleged carpal tunnel condition. The Act prohibits a settlement for future claims if the claims were not vested at the time of settlement, as is the case here. 33 U.S.C. § 908(i); 20 C.F.R. § 702.241(g); *Corner v. Chevron Internat'l Oil Co., Inc.*, 22 BRBS 218, 220 (1980). Accordingly, I find that the Order and Final Decree issued by the Rhode Island Workers' Compensation Court does not bar the Claimant from bringing the present claim under the Act.

Even if the language of the Act did not require adherence to Section 8(i) requirements, the Employer's contention that the general principles of collateral estoppel and full faith and

[2] The paragraph in its entirety states "that Respondent is hereby discharged from all liability under the Workers' Compensation Act by reason of every and all injuries, known or unknown which were or may have been sustained on 8/17/94 or on any other date during the course of Petitioner's employment with Respondent and for or by reason of any conditions resulting from the aforesaid injuries." EX 3.

credit bar the Claimant's present claim under the Act also fails here. "[F]actual findings of a state court or administrative tribunal are entitled to collateral estoppel effect in other state or federal administrative tribunals."[3] *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105, 107 (1995); *see also Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 281 (1980); *Barlow v. Western Asbestos Co.*, 20 BRBS 179, 180 (1988). However, in *Formoso* the Benefits Review Board (the "Board") also stated that "the doctrine of collateral estoppel bars only relitigation of a particular legal or factual issue that was necessarily litigated and actually decided in a previous suit." 29 BRBS at 107; *see also U.S. v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-422 (1966) (the principles of collateral estoppel and res judicata apply "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate"); *Dixon v. John J. McMullen & Assoc., Inc.* 13 BRBS 707, 714-715 (1981).

The Employer's reliance on *Bath Iron Works v. Dir., OWCP (Acord)*, 125 F.3d 18 (1st Cir. 1997) does not assist its argument. In *Acord*, the First Circuit Court of Appeals held that a Maine Workers' Compensation Commission's decision holding that the claimant's injury had no lasting effect on the claimant's condition should have been given collateral estoppel effect in a claim brought under the Longshore Act. 125 F.3d at 18, 22-23. The court here found that the administrative law judge was bound by collateral estoppel to adopt the factual findings of the Maine Agency, stating, "[T]he point of collateral estoppel is that the first determination is binding not because it is right but because it is first – and was reached after a full and fair opportunity between the parties to litigate the issue." *Id.* at 22. Unlike the claimant in *Acord*, however, the Claimant in the present matter signed a settlement agreement that was ratified by the State of Rhode Island's Workers' Compensation Court.

The present case more closely resembles *Dixon v. John J. McMullen & Assoc., Inc.*, in which the Board found that collateral estoppel did not bar the claimant from pursuing a Longshore claim because a settlement made pursuant to the Maine workers' compensation statute "merely ratified the parties' mutual agreement." 13 BRBS 707, 714-715 (1981).[4] Thus, the Board found, the matter was not actually litigated before the state commission. *Id.* at 716. Moreover, in the present case the Claimant's federal Longshore claim is for a different injury than that for which he settled his state claim in 1995. It can not be said, therefore, that any aspect of the Claimant's federal claim could have been actually litigated in the State of Rhode Island court. Following the Board's decision in *Dixon*, I find that collateral estoppel principles

[3] Where mixed questions of law and fact are involved, collateral estoppel effect can only be given to such questions when the legal standards are the same in the two jurisdictions. *Barlow*, 20 BRBS at 180; *see Formoso,* 29 BRBS at 107; *Newport News Shipbldg. & Dry Dock Co. v. Dir., OWCP*, 583 F.2d 1273 (4th Cir. 1978).

[4] In *Arizona v. California*, the United States Supreme Court stated, "In the case of a judgment entered by confession, consent, or default, none of the issues is *actually litigated*." 530 U.S. 392, 414 (2000) (emphasis in original) (citing Restatement Second of Judgments § 27 (1982)). In addition, the Court stated that "settlements ordinarily occasion no issue preclusion . . . unless it is clear . . . that the parties intend their agreement to have such an effect." *Arizona v. California*, 530 U.S. at 414.

do not apply to the Claimant's 1995 Rhode Island settlement, in that the issues in that claim were not "necessarily litigated and actually decided."[5] *Formoso*, 29 BRBS at 107.

B. Causation

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. 902(2). *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Brown*, 194 F.3d at 4, *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem*. 600 F.2d 280 (D.C.Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused his harm. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP (Riley),* 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986).

Once a claimant establishes a prima facie case, the claimant has invoked the presumption, and the burden of proof shifts to employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Dir., OWCP, (Shorette)*, 109 F.3d 53 (1st Cir. 1997); *Merrill*, 25 BRBS at 144; *Parsons Corp. of California v. Dir., OWCP,* 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier,* 16 BRBS at 128. If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995); *Sprague v. Dir., OWCP,* 688 F. 2d 862 (1st Cir. 1982).

[5] The Court notes that it reaches a different conclusion than that of Judge Kaplan in *Cyr v. EBC*, 2001-LHC-01383 (July 21, 2003), cited by the Employer. In *Cyr*, Judge Kaplan notes that "the State agency did not make any findings other than to accept and enforce the settlement to which Claimant had agreed of his own volition." *Cyr* at 8. The significance of the settlement to Judge Kaplan was that the mere acceptance and enforcement of a settlement rendered irrelevant any differences between the federal and state acts' burdens of proof, which in turn led Judge Kaplan to find that collateral estoppel could and did apply. *Id.* This Court, however, is bound by and follows the Board's decision in *Dixon*, which found that the settlement did not bar a claim under the Act because the matter was not actually litigated. 13 BRBS at 716.

The Claimant here alleges that he has a permanent partial impairment to both hands that was caused by his work for the Employer. The Claimant testified that while working for the Employer, he used pneumatic grinders and burr tools, and regular hand tools such as wrenches, punches and hammers for approximately four hours a day on average. TR 21-22, 24, 28. The Claimant further testified that at the end of every workday, he would feel numbness and tingling in his hands due to the vibrations of the tools. TR 27-28.

To support the claim that he has a work-related hand condition, the Claimant relies on the medical opinions of Dr. John Meyer, who is board certified in occupational medicine and currently practices as an Assistant Professor at the University of Connecticut School of Medicine and Occupational Medicine. CX 4 at 4. Dr. Meyer initially saw the Claimant for his hand condition in March 2003, at which point he took the Claimant's medical history and performed a physical examination of his hands. CX 4 at 5. Dr. Meyer testified that the Claimant made him aware that he felt numbness and tingling in his hands. *Id.* at 9. A Tinel's test indicated carpal tunnel syndrome on the left side. *Id.* at 10. After the Claimant's initial visit, he was fitted with hand splints prescribed for nighttime wear. *Id.* at 17. Dr. Meyer examined the Claimant a second time on May 20, 2003, at which time the Claimant had positive Tinel's tests in both hands. Dr. Meyer testified that based on his examination and the findings from various tests, including positive Tinel's and Phalen's tests, he concluded that the Claimant had bilateral carpal tunnel syndrome. CX 4 at 10-13, 14. Dr. Meyer also testified that based upon monofilament testing and the Claimant's reports of loss of sensation in his fingers, he concluded that the Claimant has nerve damage attributable either to carpal tunnel syndrome or "possibly damage to small nerve fibers or nerve endings" in the Claimant's fingers. *Id.* at 13. He stated that the Claimant's monofilament testing in May 2003 showed slightly improved but still "mildly abnormal" results. *Id*. at 17. He further stated that he did not believe surgery was appropriate for the Claimant at this point. *Id.* at 18. Dr. Meyer assigned an eight percent permanent partial impairment of both hands under the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition* ("AMA Guides"), seven percent of which he attributes to the Claimant's employment at Electric Boat. *Id.* at 19-21.

I find that the Claimant is a credible witness and that he has presented evidence showing that working conditions existed which could have caused his hand condition as diagnosed by Dr. Meyer. Therefore, the Claimant has successfully presented his prima facie case and has invoked the presumption of causation.

The burden now shifts to the Employer to rebut the presumption. If a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment, the employer has sufficiently rebutted the presumption. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS at 41-42; *Kier,* 16 BRBS at 128. The Employer here contends that the long duration between the time of the Claimant's last working day at Electric Boat (August 18, 1994) and the time of the filing of his claim for compensation under the Act (October 14, 2002) indicates failure to show causation. Emp. Br. at 8-9. In addition, the Employer argues that the Claimant never lost time at work because of his hands, and that he never sought medical treatment. Emp. Br. at 9; TR 37 (Claimant's testimony).

The Employer relies on the testimony of Dr. Philo Willets, Jr., a board certified orthopedic surgeon, to rebut the presumption of causation. In his medical report following an independent medical examination of the Claimant, Dr. Willets states that the Claimant told him he had reported his hand symptoms to Electric Boat at the time he was employed. EX 12 (1/10/2003 medical report attached).[6] Based upon his examination of the Claimant and his review of the test reports of Dr. Bellafiore, to whom the Claimant was referred for nerve conduction tests following Dr. Willets' physical examination, Dr. Willets diagnosed the Claimant with "mild bilateral neuropathy – with some tests consistent with carpal tunnel syndrome." *Id.* at 5. In addition, the January 10 medical report notes that the Claimant is chronically obese. *Id.* at 5-6. Dr. Willets opined that the Claimant's hand condition is linked to his work for the Employer if it can be confirmed that he reported the injury to Electric Boat during his employment. *Id.* at 6. Dr. Willets also stated that if such confirmation cannot be made, then "it appears that his symptoms first manifested to the point of seeking attention approximately one year ago and have just been retroactively linked." *Id.*

In his January 10, 2003 report and in his deposition testimony, Dr. Willets states that other factors such as the Claimant's obesity, motorcycle riding and employment subsequent to working at Electric Boat "would more plausibly speak to causality than his remote work at Electric Boat Corporation a number of years ago." EX 12 at 15; 1/10/2003 Report at 6-8. In particular, Dr. Willets testified that the Claimant's employment following his tenure at Electric Boat involved "quite a bit" of carrying and hand use while working at a dairy, and the use of vibratory tools (weed whackers and chain saws) while working for the State of Rhode Island. EX 12 at 15. His medical report also notes that "obesity is one of the strongest correlates with slowed nerve conduction on some large electrical diagnostic reported series." 1/10/2003 Report at 6. In addition, Dr. Willets testified that the results of the Claimant's monofilament test taken by Dr. Meyer in May 2003 showed a slight deterioration in the Claimant's hand condition as compared with the results of the same testing performed on November 22, 2002 by Dr. Willets. EX 12 at 24. He stated that evidence showing deterioration of the Claimant's hand condition "indicate[s] that there was a more recent problem or cause of his neuropathy that was causing things to get worse" and that "the condition is not at all related to exposure [at] Electric Boat Corporation." *Id.* at 25, 26.

Because Dr. Willets has provided other causes for the Claimant's carpal tunnel syndrome and has testified to a reasonable degree of medical certainty that the Claimant's hand condition is not causally related to his employment at Electric Boat, I find that his testimony as offered by the Employer is sufficient to rebut the presumption of causation. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS at 41-42. Therefore, the presumption falls out of the case.

I must now consider all of the evidence in determining whether the Claimant's hand condition was caused or aggravated by his work at Electric Boat. *See, e.g., Del Vecchio v. Bowers*, 196 U.S. at 280. Drs. Meyer and Willets both agree that the Claimant has bilateral carpal tunnel syndrome. EX 12 at 12-13; CX 4 at 13-14. As discussed above, Dr. Willets opines that the Claimant's condition is not caused by his work at Electric Boat because he did not report

[6] To distinguish Dr. Willets' deposition testimony from the attached medical report dated January 10, 2003, which with Dr. Willets' Curriculum Vitae comprise EX 12, the deposition is referenced as EX 12, while the January 2003 report and the Curriculum Vitae are referenced as 1/10/2003 Report and CV, respectively.

any injury while working for the Employer, and because of other factors such as the Claimant's obesity and employment subsequent to working at Electric Boat. EX 12 at 25-26. Dr. Willets also stated that the results of the Claimant's monofilament test taken by Dr. Meyer in May 2003 showed a slight deterioration in the Claimant's hand condition as compared with the results of the same testing performed on November 22, 2002 by Dr. Willets. He testified that he believed Dr. Meyer's findings to be accurate, and he concluded that the slight deterioration in those six to seven months was not caused by prior work at Electric Boat, but is rather related to other factors. EX 12 at 24, 25-26.

The issue of causation in the present matter is a close one. The Claimant appears not to have reported his injury to the Electric Boat, which remains a concern. However, Dr. Meyer testified that in his experience, very few employees report the symptoms of numbness or tingling early on. CX 4 at 30. On balance, I credit Dr. Meyer's testimony that the Claimant's history of pneumatic tool use for approximately ten to twenty hours per week over a period of fifteen years at Electric Boat contributed to his hand condition. I also find unpersuasive the evidence that the Claimant's condition worsened based on the monofilament testing between the time of Dr. Willets' and Dr. Meyer's examinations. Both doctors acknowledge that the difference in the test results is mild, and that the test has a highly subjective component. Although Dr. Willets assumes that Dr. Meyer's monofilament testing results were accurate, he also notes that the overall results of both doctors' physical examinations of the Claimant are similar. EX 12 at 53.

In sum, based on the evidence presented, I find that the Claimant has successfully established that his hand condition was caused by his employment at Electric Boat. As discussed above, I credit Dr. Meyer's testimony that the Claimant's condition is work-related, and find that he provides a reasoned basis for his medical opinions. The remaining issue to be adjudicated is the nature and extent of the Claimant's injury.

C. Nature and Extent of Injury

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbldg. Constr. Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

1. Nature of Disability

There are two tests for determining whether a disability is permanent. Under the first test, a Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask,* 17 BRBS at 60. The question of when maximum

medical improvement is reached is primarily a question of fact based upon medical evidence. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). An administrative law judge may rely on a physician's opinion in establishing the date of maximum medical improvement. *Miranda v. Excavation Constr., Inc.,* 13 BRBS 882 (1981). Under the second test, a disability may be considered permanent if the impairment has continued for a lengthy period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir.1968) *cert. denied* 394 U.S. 976 (1969); *Air Am., Inc. v. Dir., OWCP,* 597 F.2d 773, 781-782 (1st Cir. 1979).

In the present matter, Drs. Meyer and Willets agree that the Claimant has a permanent impairment to both hands. CX 4 at 18-19; EX 12 at 16. Furthermore, I credit Dr. Meyer's medical opinion that the Claimant reached maximum medical improvement on May 20, 2003, the date of the Claimant's follow-up examination by Dr. Meyer. CX 4 at 18-19. Dr. Meyer based his opinion on the results of his physical examination and testing of the Claimant, as well as the Claimant's statements that he would be unable to continue physical therapy due to his current employment. CX 4 at 18-19. Based on this opinion and the evidence establishing that the Claimant continues to have a residual disability after May 20, 2003, I find that the Claimant's hand condition constitutes a permanent partial disability and that the date of maximum medical improvement was May 20, 2003.

2. Extend of Disability

The parties dispute the extent of the Claimant's hand condition and the rating attributable to his permanent partial impairment. The Claimant relies on the rating provided by Dr. Meyer, who gives a permanent partial impairment rating of seven percent to each hand, based on a six percent impairment for hand injury under the *AMA Guides* and an additional one percent impairment for occupational nerve damage. CX 4 at 20-21. In a separate opinion, Dr. Gregory Austin of Orthopaedic Associates, Inc. in Cranston, Rhode Island, assigns a five percent impairment rating to each hand under the *AMA Guides*. EX 14 at 2. Dr. Austin's assessment is based solely on his review of the medical records of Drs. Bellafiore, Meyer and Willets. *Id.* at 1. Dr. Willets' assessment of the Claimant also finds a five percent permanent partial disability under the *AMA Guides*. 1/10/2003 Report at 7. However, Dr. Willets ascribes only three percent of that rating to the Claimant's work-related activities at Electric Boat, and the remaining two percent to factors such as motorcycle riding, subsequent exposure to vibration, and obesity. *Id.* In addition, Dr. Willets states that the three percent rating should be reduced to two percent if no documentation of any complaints to Electric Boat can be found. *Id.* at 8.

In determining the extent of the Claimant's injury, I rely on the assessments and medical opinions of Drs. Meyer and Willets rather than the report of Dr. Austin, because Drs. Meyer and Willets had occasion to examine the Claimant in person. In his deposition, Dr. Meyer acknowledges that the results of monofilament testing can differ from day to day and from one examiner to another. CX 4 at 27. It is the monofilament test that Dr. Meyer used as a basis from which to add another one percent work-related impairment to the six percent ascribed under the *Guides*.[7] CX 4 at 20-21, 25. Based on the variability and subjective nature of the test as well as

[7] Dr. Meyer's assessment assigned an additional two percent impairment to each hand for nerve damage, but he stated that only one percent of that was related to work at Electric Boat. CX 4 at 21.

the small percentage of impairment assessed, I do not credit the additional one percent impairment rating assigned by Dr. Meyer here. Moreover, I note the potential for inaccuracy and abuse in making such additional impairment ratings as described in the deposition testimony of Dr. Willets. *See* EX 12 at 22-24. In his deposition, Dr. Willets testified that he disagrees with the process of making additional diagnoses of impairment based on the same symptoms (here numbness and tingling) already diagnosed and rated under the *AMA Guides*. EX 12 at 23-24. He suggests that doing so does not comport with the way in which the *AMA Guides* are meant to be used. EX 12 at 23. In his view, the AMA Guides emphasize a ratings assessment based on total damage. *Id.* at 23-24.

However, I also do not credit Dr. Willets' method in reducing the Claimant's 5 percent rating for hand injury under the *AMA Guides* to a 3 percent permanent partial disability. Dr. Willets testified that he arrived at a total of 3 percent impairment by apportioning the hours spent by the Claimant in working with vibratory tools at Electric Boat and by assigning percentages to workplace exposure and other factors. EX 12 at 18. Dr. Willets' rationale remains legalistic and attempts to attribute cause outside his role as a medical expert. For similar reasons, I do not credit Dr. Willets' statement that the Claimant's total impairment should be reduced to two percent if it is found that the Claimant did not report numbness and tingling in his hands to Electric Boat at the time of his employment there.

Under Table 16-2 in the *AMA Guides*, 5th Edition, an upper extremity impairment rating of 5 percent can be converted to either a 5 or 6 percent impairment rating for the hand. *See AMA Guides*, 5th Edition, Table 16-2 at p. 439. While Dr. Meyer converts the 5 percent upper impairment rating to a 6 percent hand impairment, Dr. Willets' interpretation of the Conversion Table leaves the Claimant's hand impairment rating at 5 percent. CX 4 at 20; 1/10/2003 Report at 8. Based on the credibility of the Claimant's testimony and the evidence proffered, I will follow Dr. Meyer's rating of six percent permanent partial impairment to each hand under the *AMA Guides*. Therefore, I find that the Claimant has a 6 percent permanent partial disability to each hand due to carpal tunnel syndrome.

D. Medical Care

Under Section 7 of the Act, a claimant who suffers a work-related injury is entitled to reasonable and necessary medical treatment. 33 U.S.C. §907(a); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). I have determined that the Claimant's carpal tunnel syndrome is related to his work at Electric Boat. The Claimant is, therefore, entitled to medical care for the condition. As the responsible party, the Employer in the instant matter thus remains liable for this Claimant's medical benefits. Accordingly, I conclude that the Employer shall pay the Claimant for medical expenses reasonably and necessarily incurred as a result of the Claimant's work-related hand condition. *Colburn v. General Dynamics Corp.,* 21 BRBS 219, 222 (1988).

E. Attorney's Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under Section 28 of the Act. *Am. Stevedores v. Salzano* 538 F. 2d 933,

937 (2nd Cir. 1976). On April 5, 2004, the Claimant's attorney, Lance Proctor, filed an itemized application for attorney's fees and costs in the amount of $7,397.75. The Employer shall file any objection to the fee petition within 15 days of the issuance of this Decision and Order.

F. Conclusion

In sum, I have found that the Claimant's hand condition is related to his employment at Electric Boat, and that he has a six percent permanent partial impairment to each hand based on the impairment ratings followed under the *AMA Guides*.

III. ORDER

1. The Employer, Electric Boat Corporation, shall pay directly to the Claimant, James Lee, six percent permanent partial disability compensation pursuant to 33 U.S.C. § 908(c)(a) based upon at a rate of 66 2/3 per cent of the average weekly wage of $580.45 from May 20, 2003 to the present and continuing;

2. The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's employment related hand condition may require pursuant to 33 U.S.C. § 907;

3. The Employer shall file any objection to the fee petition submitted pursuant to 33 U.S.C. § 928(a) by the Claimant's attorney, Lance G. Proctor, within 15 days of the date this Order is issued; and

4. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts